

December 14, 1999

NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

**Barbara A.
Schmerhorn
Clerk**

IN RE KONI J. ANTONICH, also
known as Deby J. Antonich,

Debtor.

BAP No. WO-99-031

DAN FOSSLER,

Appellant,

v.

KONI J. ANTONICH,

Appellee.

Bankr. No. 98-15138
Chapter 13

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before PUSATERI, CLARK, and BRUMBAUGH, Bankruptcy Judges.¹

BRUMBAUGH, Bankruptcy Judge.

Appellant Dan Fossler ("Fossler") appeals the final order of the United States Bankruptcy Court for the Western District of Oklahoma denying his Motion to Amend an Informal Proof of Claim. In that order the Court determined that Fossler's previously filed Objection to Confirmation of Debtor's Plan did not meet the standard for an informal Proof of Claim and that no timely claim had been filed by Fossler.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

¹ Honorable Roland J. Brumbaugh, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

I. Background

Koni J. Antonich (“Debtor”) filed her Chapter 7 petition on May 21, 1998. On July 28, 1998, the United States Trustee’s Office moved to dismiss Debtor’s Chapter 7 case for substantial abuse pursuant to 11 U.S.C. § 707(b).² Thereafter, on September 30, 1998, the Debtor moved to convert her case to Chapter 13, which motion was granted on October 26, 1998. The Court issued its Notice of Commencement of Case on November 2, 1998, setting the § 341 meeting for December 10, 1998, and providing notice that the deadline for filing a Proof of Claim was March 3, 1999.

The Debtor filed her proposed Chapter 13 Plan, and Fossler filed his timely Objection to Confirmation of Debtor’s Plan on December 7, 1998. In the first paragraph of that Objection Fossler asserted the following:

Fossler is the primary unsecured creditor of Debtor Koni Antonich. Antonich’s debt to Fossler arises from a judgment rendered against her May 13, 1998 by a Tulsa jury for her failure to repay a loan from Fossler and for her malicious prosecution of Fossler. Fossler’s unsecured debt is approximately \$27,000.00, including statutory interest, costs and attorney’s fees.

Fossler admits receiving the Notice of the bar date for filing a Proof of Claim. He also admits that the Trustee at the § 341 meeting reminded his counsel to file a Proof of Claim. Finally, at the initial confirmation hearing held on January 26, 1999, Fossler’s counsel made the following statements:

I have been unable in the past month to get ahold of my client, Your Honor, and obtain some documentation, so I have not filed a claim. I believe I have until March 3rd under the Court’s order, and I will do so as soon as I can. (Transcript January 26, 1999, pp. 3-4).

I can get a claim on file. I would hope — I haven’t been able to contact my client. I haven’t been able to get him since the new year. I would hope that I can do that in the next couple of weeks and at least get a claim on file that we can start arguing about. (Transcript January 26, 1999, pp. 17-18).

² Unless otherwise noted, all future statutory references are to title 11 of the United States Code.

Although Fossler had a judgment against the Debtor, there were apparently some issues concerning attorney's fees remaining in state court. Fossler claimed in his Motion to Amend Informal Proof of Claim that he did not file a timely claim "because of his uncertainty concerning the liquidated value of the claim as it may be affected by actions currently pending" before the state court.

On March 23, 1999 (twenty days after the bar date for filing a Proof of Claim), Fossler served a Motion for Relief from Stay for the limited purpose of liquidating his claimed attorney's fees in state court and requesting that he be granted ten days after the state court ruling within which to file a claim in bankruptcy court incorporating the state court award. This Motion was opposed by Debtor.

On March 31, 1999, the day of the continued confirmation hearing, Fossler filed his Motion to Amend Informal Proof of Claim and attached thereto a formal Proof of Claim which increased his claim from \$27,000 to \$31,182.51. At this time the Debtor's proposed Chapter 13 Plan had not been confirmed and no distribution to creditors had been made by the Trustee.

At the continued confirmation hearing, the Debtor asserted that Fossler had no standing to object to the Debtor's proposed Chapter 13 Plan because he had failed to timely file a Proof of Claim. Fossler's counsel informed the Court of his Motion to Amend Informal Proof of Claim. The Court asked for a copy of the Motion, took a short recess, denied the Motion and, holding that Fossler had no standing to object to the Debtor's Plan, confirmed the Plan. The Court then issued its written order denying Fossler's Motion on April 2, 1999.

II. Standard of Review

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr.

P. 8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996). The decision of the bankruptcy court as to whether the equities of the case favor treating the Objection to Confirmation as an informal proof of claim is reviewable under an abuse of discretion standard. *United States v. Berger (In re Tanaka Bros. Farms, Inc.)*, 36 F.3d 996, 998 (10th Cir. 1994). Under this standard, we will not disturb the bankruptcy court's decision unless we have a "definite and firm conviction" that the bankruptcy court made a mistake. *Id.*

III. Discussion

The controlling authority in this circuit on the issue of whether to allow an amended proof of claim based upon a timely filed "informal proof of claim" is *Clark v. Valley Federal Savings & Loan Ass'n (In re Reliance Equities, Inc.)*, 966 F.2d 1338 (10th Cir. 1992). There the Tenth Circuit approved a five-prong test with respect to informal proofs of claim:

1. The proof of claim must be in writing;
2. The writing must contain a demand by the creditor on the debtor's estate;
3. The writing must express an intent to hold the debtor liable on the debt;
4. The proof of claim must be filed with the bankruptcy court; and
5. Based on the facts of the case, it would be equitable to allow the amendment.

Debtor concedes that Fossler's Objection to Confirmation filed December 7, 1998, satisfies the first four prongs of that test. Thus, the issue is whether the Court abused its discretion in determining that, given the facts of the case, the equities did not favor treating the Objection to Confirmation as an informal proof of claim.

In this case the claimant or his counsel was well aware of the bar date and the need to file a timely Proof of Claim. Counsel not only acknowledged this in open court but expressed his intent to file a Proof of Claim (implying that the Objection to Confirmation was not intended as a Proof of Claim). On the other side is the Trustee who, at the January 26, 1999, confirmation hearing asserted that since Fossler had not

yet filed a claim she was in a quandary as to how to determine if the Debtor's proposed plan was feasible because it was a 100% payment plan and the exact amount of Fossler's claim was unknown. That same quandary existed for the Court, and the issue was not resolved by the time of the continued confirmation hearing on March 31, 1999. As the Tenth Circuit stated in *Reliance Equities, supra*, "the equities do not favor protecting a [claimant] that had numerous opportunities to protect itself." 966 F.2d at 1345. Under these facts, it was not an abuse of discretion for the bankruptcy court to deny Fossler's Motion to Amend Informal Proof of Claim.

Debtor also asserts that the doctrine of informal proofs of claim does not apply in Chapter 13 cases. Because of the disposition of this appeal it is unnecessary to decide that issue.

IV. Conclusion

For the reasons set forth above, the bankruptcy court is AFFIRMED.